

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

In the Matter of)	Docket No. FCU-2013-0007
)	
The Complaint of Carolyn Frahm)	(C-2013-0025)
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)	

**WINDSTREAM’S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS**

The doctrines of comity, abatement, first-filed case and res judicata/issue preclusion, in addition to principles of efficient utilization of governmental resources, avoidance of vexatious and harassing litigation, avoidance of inconsistent results, collateral estoppel, and common sense require this proceeding be dismissed as set forth herein.

The Initial Complaint

This proceeding arises from a complaint filed by Carolyn Frahm, of Mount Pleasant, Iowa, on March 1, 2013 in which she stated that on several occasions from August 2012 until the date of her complaint, her telephone calls to a friend in Mediapolis did not complete. At the time the call completion difficulties began, her telephone service was provided by Mediacom. Ms. Frahm switched her telephone service to Windstream on February 6, 2013, and she reported that she continued to experience difficulty completing calls to her friend in Mediapolis. Ms. Frahm contacted Windstream on February 27, 2013 to report the issue. Windstream opened a trouble ticket, tested Ms. Frahm’s telephone line and was able to complete the calls from the switch. Ms. Frahm then placed a call herself to her friend, and she was able to complete the call.

Ms. Frahm contacted Windstream again on March 1, 2013 to report the issue. Windstream created a trouble ticket, tested the line, and the call was completed successfully. Ms. Frahm called the number herself, and the call was completed successfully

Ms. Frahm contacted Windstream again on March 7 and reported her calls were not completing to her friend in Mediapolis. At that time Windstream changed the underlying carrier to Verizon. Since then, Ms. Frahm has not reported any difficulty with call completion.

The Board Proceeding

On May 9, 2013 the OCA filed its Request for Formal Proceeding, and on July 15 the Board granted the request, docketed the complaint and assigned the case to Administrative Law Judge Amy L. Christensen for further proceedings. A telephone prehearing conference was held on July 31 in which the parties participated, and on August 1, 2013 Judge Christensen entered an order giving the OCA 60 days for discovery and investigation. On October 1 the OCA filed its Response stating that it had “not yet commenced discovery in this case” and asked for an additional 60 days for discovery and investigation.

OCA served its first discovery requests on the parties on December 16, more than four and one half months after the initial telephone prehearing conference call, and asked for an additional 60 days for discovery and investigation. On February 28, 2014 Windstream responded to the OCA’s discovery. On May 6 OCA served supplemental discovery requests on Windstream to which Windstream responded on June 11, 2014.

On April 16, 2014 OCA requested an additional 90 days for discovery, which was granted, extending the time for discovery to August 8, 2014.

The FCC Proceeding

On February 20, 2014 the FCC released and made public its Order adopting a Consent Decree entered into between the FCC's Enforcement Bureau and Windstream Corporation, resolving and terminating an investigation by the FCC in connection with Windstream's call completion practices to rural areas. Among other things, the Order:

- Terminates the FCC's investigation of Windstream that began in November 2012;
- Requires Windstream to designate a senior corporate manager to serve as a Compliance Officer responsible for developing, implementing and administering a Compliance Plan;
- Requires Windstream to implement procedures to help ensure compliance with the Communications Act;
- Requires the Compliance Officer to develop and distribute a Compliance Manual to help ensure compliance with the Communications Act;
- Requires Windstream to establish and implement a Compliance Training Program on compliance with the Communications Act and to train selected employees within 90 days pursuant to the Compliance Training Program;
- Requires Windstream to cooperate with the FCC and rural LECs to undertake commercially reasonable steps to establish test points and uniform test criteria to evaluate rural call completion when complaints or data indicate potential rural call completion problems;
- Requires Windstream to notify an intermediate provider causing call completion problems and work with such providers to analyze and resolve problems promptly, and

to terminate an intermediate provider that has sustained inadequate performance on a particular route.

- Requires Windstream to report any noncompliance with FCC rules adopted in the *Rural Call Completion Order*.
- Requires Windstream to file Compliance Reports with the FCC within 90 days after the Effective Date and annually thereafter for three years.
- Provides that Windstream will make a voluntary contribution to the United States Treasury of \$2,500,000.

As required by the Order, Windstream filed its Compliance Report in May 2014 and will continue to file compliance reports with the Enforcement Bureau as it monitors, addresses and resolves any ongoing difficulties with rural call completion issues.

Applicable Legal Standards

A. The Iowa Utilities Board Should Apply the Doctrine of Comity and Dismiss this Case.

The doctrine of comity is well known and frequently applied in courts throughout the country as a means of efficient utilization of judicial resources. *In re Treco*, 240 F.3d 148 (2nd Cir. 2001). Comity is a legal doctrine that arises out of mutual respect and deference among different jurisdictions, as a matter of convenience and the orderly administration of justice. *Galloway v. Watts*, 395 F.Supp. 729, D. Md. A frequently cited case, that arose in an international context, adopted what courts have referred to the “classic definition of comity”:

“Comity”, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a matter of courtesy and good will, upon the other, But it is the recognition which one nation allows within its territory to the legislative,

executive, or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. *Hilton v. Guyot*, 159 U.S. 113, 141, 16 S. Ct. 139, 40 L. Ed. 95 (1895)

Iowa courts also recognize the doctrine of comity as a principle that permits, but does not require, a court to stay a pending proceeding if a case involving the same parties and subject matter is pending in the court of another state. *Struebin et al. v. State of Iowa*, 322 N.W.2d 84 (Iowa 1984). “Comity is a doctrine under which courts will give effect to the laws of another state as a matter of deference and respect rather than duty.” Citing to *Jacobsen v. Saner*, 72 NW 2d 900 (Iowa 1955)

While the doctrine of comity is perhaps most frequently applied by courts of the same state, there is no reason the doctrine should not be applied to similar proceedings in state and federal courts. Under the doctrine of comity, one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. The doctrine of comity is one of deference and respect among tribunals of overlapping jurisdiction, and underlies the policy of permitting state courts to try state cases free of federal interference. ***Likewise, a state court should refuse to exercise jurisdiction over an action once it is apprised of the fact that the federal court has assumed jurisdiction of an earlier suit based on the same cause of action.*** *Ex parte AmSouth Bank*, 735 So.2d 1151, (Alabama 1999) (Emphasis added).

Here, it is apparent that both the Iowa Utilities Board and the Federal Communications Commission have exercised jurisdiction with regard to rural call completion issues. The Office of Consumer Advocate, and the Enforcement Bureau of the Federal Communications

Commission have or had ongoing investigations into an entire panoply of issues arising because of difficulties with dropped and uncompleted calls in rural areas.

The Windstream case at the FCC was initiated in November 2012, and the Enforcement Bureau conducted a broad nation-wide investigation into the causes of and solutions to problems with rural call completion for the benefit of many consumers. The case at the FCC was resolved in its entirety on February 20, 2014 with entry of the Consent Decree.

In contrast, after the FCC case began, the OCA filed its Request for Formal Proceeding on May 9, 2013 regarding a single complaint filed by Ms. Frahm, and formal proceeding in this case was initiated by the Board on July 15, 2013. This case is still in the discovery phase with the OCA, through its discovery requests, apparently seeking to determine for itself the underlying technical causes of call completion failures. After being initially allowed 60 days in which to do discovery, the OCA has requested and received three extensions of time for additional discovery to August 8, 2014. After more than one year since OCA filed its Request for Formal Proceeding, the matter appears to be far from resolution.

In conducting investigations of call completion problems the FCC recognized the importance of the FCC working with its “state partners” in resolving rural call completion issues¹ and noted that the FCC’s state partners urged the FCC to apply its requirements to intrastate, as well as interstate, calls.² The FCC further noted its desire to advise its “state partners of relevant problems within their states.”³ Even the OCA has urged that the “Board and the FCC are addressing the same problem within their respective jurisdiction”. The OCA apparently overlooks that the FCC applies its requirements to both interstate and intrastate calls. In its

¹ FCC, Report and Order and Further Notice of Proposed Rulemaking, November 18, 2013, Par. 15.

² Id., Par. 34, referring to Replies from Iowa Telecommunications Association and Iowa Network Services.

³ Id., Par. 46.

Resistance to Verizon's Motion to Dismiss, OCA stated "[t]here is no good reason why federal and state officials should need to duplicate each other's parallel investigatory work."⁴ Windstream couldn't agree more. The FCC has completed its investigation. The OCA has no need to conduct its own separate investigation.

In the Consent Decree, the FCC recognized that finding the causes for technical failures is best left to the companies involved and focuses instead on requiring Windstream, not the FCC, to implement a plan and procedures to resolve call completion failures before they occur. The reporting requirements permit the FCC to monitor the effectiveness of Windstream's compliance program. Thus, Windstream will be focusing on rural call completion issues, as it complies with the Consent Decree.

Similarly, the FCC's rules establish quarterly reporting requirements that must be certified by an officer or director, § 64.2105, for all Covered Providers, including Windstream, and the data collected may be shared with the states upon request, § 64.2109(b). The rules require long distance providers not to convey a ringing indication until the terminating provider has signaled that the called party is being alerted to an incoming call. Intermediate providers must accurately provide signaling information to providers in the call path, § 64.2201. The prohibition on false ringing signals will help the FCC isolate call completion problems.⁵ No additional investigation of Windstream's rural call completion practices is required by the OCA or the Board in light of the FCC's rules and the adjudication of Windstream's case at the FCC on a much larger scale.

⁴ OCA's Resistance to Verizon's Motion to Dismiss, June 11, 2014, Par. 19.

⁵ FCC Report and Order, Par. 118.

Given the nation-wide comprehensive resolution of the case at the FCC, it is apparent that the Board has no interest greater than or any different from the interest of the FCC. In both cases the objectives are the same – to reduce and eliminate as much as possible ongoing problems with rural call completion. When that premise is accepted, this is an appropriate case for application of the doctrine of comity, and the Board should dismiss this case.⁶

B. In Addition, or in the Alternative, The Iowa Utilities Board Should Apply the Doctrine of Abatement and Dismiss this Case.

The doctrine of abatement is well known in Iowa and has been applied in appropriate circumstances since at least 1882. In *Radford v. Folsom*, 14 F. 97, 98, (Iowa 1882) the court said:

If it appears that the two proceedings, being between the same parties, and for the enforcement or protection of the same rights, will result in the granting of the same remedy, operative within the same territorial limits, then it would seem clear that the second is not needed to protect or enforce the plaintiff's rights, and as the defendant must of necessity be put to additional trouble and expense in defending the second action, it follows that he is thereby vexatiously harassed, and in such case he should be enabled to protect himself by causing the abatement of the second action. *It is the duty alike of the state and the United States court to protect a defendant from unnecessary and vexatious litigation. If the first action is brought in the state and the second in the federal tribunal, or vice versa, it is the bringing of the second action that constitutes the oppressive and unnecessary act on part of plaintiff, and the corrective should be applied in the court whose jurisdiction is invoked oppressively and wrongfully.* Again, the fact that the one action is pending in the state and the second in the federal court, instead of being a reason why the second should not be abated, is, on the contrary, a weighty argument for just the opposite conclusion; for if the two proceedings are allowed to proceed at the same time, there may arise all the difficulties from a conflict between the two jurisdictions, acting within the same state. . . . (Emphasis added).

⁶ In the exercise of the doctrine of comity, courts will generally stay a proceeding in one jurisdiction in deference to another, when the case in the other jurisdiction is still pending. Since the FCC proceeding has concluded with the entry of the Consent Decree, a stay in this case would be superfluous, and there is no reason to continue this case. Because the matter has already been adjudicated at the FCC, this case should be dismissed.

In this case, since the case was initiated first at the FCC, prior to the Board authorizing a formal proceeding, this case pending before the Board should be abated, and the case should be dismissed.

C. The First-Filed Rule Applies Here That the First Court to Establish Jurisdiction Has First Priority to Consider the Case.

The first-filed rule is often applied in courts when the same or substantially similar claims are asserted by one party against another. The well-established rule is that in cases of concurrent jurisdiction, “the first court in which jurisdiction attaches has priority to consider the case.” *Orthmann v. Apple River Campground Inc.*, 765 F.2d 119, 121 (8th Cir.1985). “The purpose of this rule is to promote efficient use of judicial resources. The rule is not intended to be rigid, mechanical, or inflexible, but should be applied in a manner serving sound judicial administration.” *Id.*, *Orthmann*. (Citations omitted).

The prevailing standard is that “in the absence of compelling circumstances,” the first-filed rule should apply. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1174 (11th Cir.1982). In *Keymer v. Management Recruiters International, Inc.*, 169 F.3d at 503, n. 2, the Court said “[t]he first-filed rule gives priority, when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction in order to conserve judicial resources and avoid conflicting rulings.” Similarly, in *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir.1990) the Court held “[t]he well-established rule is that in cases of concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case.” (citing to *Orthmann* and *Merrill Lynch, supra.*)

While in many cases the first-filed rule is applied between courts of the same jurisdiction, the rule is not limited to those circumstances. In *United Artists Theatre Circuit, Inc. v. Federal*

Communications Comm'n, 147 F.Supp.2d 965, 979 n. 12 (D.Ariz.2000) the Court stated that the first-filed rule “is no less applicable when the courts set in competition against each other are a federal district court and a state court.” See also, *Commercial Union Ins., Cos. v. Torbaty*, 955 F.Supp. 1162, 1163 n. 1 (E.D.Mo.1997) (“Typically, the first-filed rule is applied when an action is filed in two federal courts. However, the rule is applied with equal force when an action is filed in federal court and state court.”) (citing *Merrill Lynch, supra.*)

In the circumstances of this case, the case at the FCC has already been resolved. Not only was the case first-filed at the FCC, it has already been adjudicated. The rationale underlying the rule applies here with even greater force: that in order to conserve judicial resources and avoid conflicting results, a court – and in this case an administrative agency – should not duplicate the services already provided by another.

D. The Principles of Res Judicata and Issue Preclusion Require that Issues that Have Already Been Litigated Should Not be Litigated Again.

“[A]n existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.” *In re Ramsay’s Estate*, 35 N.W. 2d 651,656, (Iowa 1949) citing to 30 *Am.Jur.* 908, § 161. The general and familiar rule is that: “(1) The judgment or decree of a court of competent jurisdiction on the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal, * * * (2) Any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and

cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same”.. *Id. Ramsay's Estate*.

In this case, the Consent Decree between Windstream and the FCC constitutes res judicata and issue preclusion with respect to the claims asserted by the OCA in the proceeding before the Board. Although the parties are not identical, their interests are the same – that is, Iowa Code § 476.3(1) requires public utilities such as Windstream to “furnish reasonably adequate service”. Federal law has similar requirements that common carriers “furnish communication service upon reasonable request”, 47 USC § 201(a), on terms that are “just and reasonable” § 201(b). It is clear that both the FCC and the Board have a substantially identical interest in assuring that telecommunications companies provide reliable service to their customers, and there is no question that the Enforcement Bureau of the FCC adequately represented the common interest of both.

Professor Allan D. Vestal, of the University of Iowa College of Law was a well known and widely respected expert on the issue of res judicata and issue preclusion. Writing in the Michigan Law Review, Vol. 66, No. 8, June 1968, Professor Vestal said that res judicata/issue preclusion “is used to achieve certain socially desirable ends. First, it protects litigants from harassment through the litigation of the same claim or issue. Second, the principle helps to preserve the prestige of the courts by avoiding inconsistent judgment; having the same issue decided in different ways can only undermine the general public’s esteem for the legal system. A third end served by preclusion by judgment is the saving of the courts’ time by avoiding repetition of litigation.” Professor Vestal could not have framed the issues more succinctly as they apply to this case.

Conclusion

For the foregoing reasons, the Board should give deference to the Consent Decree between the FCC and Windstream and respect its methods and procedures to resolve difficulties with rural call completion. The Board should dismiss this case in its entirety.

Respectfully submitted

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PROOF OF SERVICE

I hereby certify that the foregoing document was automatically served electronically on all parties registered with the Electronic Filing System on: June 27, 2014

Signature: /s/ Connie Love

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